

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT J. BETTS,

Petitioner,

vs.

MAGGIE MILLER-STOUT,

Respondent.

NO. CV-06-326-MWL

REPORT AND RECOMMENDATION TO
DISMISS ACTION

By Order filed December 18, 2006, the court advised Petitioner of the deficiencies of his *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. Specifically, the court noted Plaintiff had not exhausted his state court remedies. Furthermore, any challenge to the Washington State Supreme Court's interpretation of RCW § 69.50.401(a)(1)(ii) in *State v. Cromwell*, 157 Wn.2d 529 (2006), as applied to Mr. Betts's appeal, would need to be pursued to the United States Supreme Court. Petitioner presents no allegations he has done so. His assertion it would be futile to appeal his case to the Washington State Supreme Court will not excuse the exhaustion requirement.

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1 Furthermore, as Petitioner was advised in the court's previous
2 order, a federal court is limited to deciding whether a conviction
3 violated the Constitution, laws, or treaties of the United States. 28
4 U.S.C. § 2254. The Federal District Court cannot revisit the
5 Washington Supreme Court's construction of state law. See *Estelle v.*
6 *McGuire*, 502 U.S. 62, 67-68 (1991). Petitioner's claim is founded on
7 his belief that the Washington State Supreme Court has misconstrued
8 the criminal statute at issue in his case. This court, however, is
9 precluded from second-guessing State Court construction of a state
10 criminal statute on federal habeas review. *Id.*

11 For the reasons set forth above and in the previous Order, the
12 court finds Petitioner plainly is not entitled to the relief he seeks.
13 See Rule 4, Rules Governing Section 2254 Cases in the United States
14 District Courts. Accordingly, **IT IS RECOMMENDED** this action be
15 **DISMISSED WITHOUT PREJUDICE** to Petitioner seeking an appropriate
16 remedy through the Washington State Supreme Court, and by petition for
17 *writ of certiorari* to the U.S. Supreme Court.

18 **OBJECTIONS**

19 Any party may object to a magistrate judge's proposed findings,
20 recommendations or report within ten (10) days following service with
21 a copy thereof. Such party shall file with the District Court
22 Executive all written objections, specifically identifying the
23 portions to which objection is being made, and the basis therefor.
24 Attention is directed to Fed. R. Civ. P. 6(e), which adds another
25 three (3) days from the date of mailing if service is by mail.

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1 A district judge will make a *de novo* determination of those
2 portions to which objection is made and may accept, reject, or modify
3 the magistrate judge's determination. The district judge need not
4 conduct a new hearing or hear arguments and may consider the
5 magistrate judge's record and make an independent determination
6 thereon. The district judge may also receive further evidence or
7 recommit the matter to the magistrate judge with instructions. See 28
8 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73, and LMR 4, Local
9 Rules for the Eastern District of Washington. A magistrate judge's
10 recommendation cannot be appealed to a court of appeals; only the
11 district judge's order or judgment can be appealed. has failed to
12 amend his habeas petition to state a claim upon which relief may be
13 granted.

14 The District Court Executive is directed to enter this Report and
15 Recommendation, forward a copy to Petitioner and set a case management
16 deadline accordingly.

17 **DATED** this 20th day of February 2007.

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19 S/Michael W. Leavitt
20 MICHAEL W. LEAVITT
21 UNITED STATES MAGISTRATE JUDGE
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